Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-177

FRED G. BURKE, Commissioner of Education of the State of New Jersey, as Commissioner and Individually; RUTH H. MANCUSO, President of the New Jersey State Board of Education, as President and Individually; and the NEW JERSEY STATE BOARD OF EDUCATION,

Petitioners,

v.

NEW JERSEY EDUCATION ASSOCIATION; PATERSON EDUCATION ASSOCIATION; CAMDEN EDUCATION ASSOCIATION; EDUCATION ASSOCIATION OF PASSAIC; NEWARK TEACHERS ASSOCIATION; WEST NEW YORK EDUCATION ASSOCIATION; UNION CITY EDUCATION ASSOCIATION, New Jersey Corporations; JOSE YI; and MANNY DEPARA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONERS

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In the brief they filed in opposition to the petition for a writ of certiorari, respondents never disputed that the issues underlying this case are worthy of the Court's consideration. Instead, they argue that this is not the proper case for raising these issues. Respondents deem a reply brief necessary because these arguments are based on

either a misrepresentation of the procedural posture of the proceedings below or a misconstruction of the applicable law.

Non-intervention under *Younger* v. *Harris,* 401 U.S. 37 (1971), has as its underpinnings the principles of comity, equity and federalism and represents a recognition by the federal judiciary that a state and its courts will function best when they are left to discharge their own functions according to their own procedures. And application of the doctrine does not depend, as respondents insist that it does, on the quality of review provided in the state forum or the availability of a specific type of fact-finding machinery. This Court in *Juidice* v. *Vail,* 430 U.S. 327, 337 (1977), made it crystal clear that non-intervention under *Younger* is appropriate where parties have:

> "an *opportunity* to present their federal claims in a state proceeding. No more is required to invoke *Younger* abstention. There is no support in [*Gerstein* v. *Pugh,* 420 U.S. 103 (1975)] or in other cases for the District Court's belief that the state courts must have an *actual* hearing . . . in order for *Younger* and *Huffman* to apply. Appellees need be accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings . . . and their failure to avail themselves of such opportunities does not mean that the state procedures were inadequate." (emphasis original) (footnotes omitted) (citation omitted).

Furthermore, it is clear that the New Jersey rules of court make provision for a litigant to go beyond the bare *opportunity,* the existence of which is in any event sufficient to trigger *Younger* non-intervention. Respondents as much as admit this, citing several times in their brief New

Jersey procedures whereby a record may be supplemented by either testimonial or documentary evidence. N.J.R. 2:5-5(b). That respondents never resorted to these procedures is not because of their inherent limitations, but rather because there was no need. Involving as it does what is essentially a facial challenge to administrative regulations, this case does not raise issues of fact and there was no reason for respondents to create any further record. Only after having been rebuffed by New Jersey courts under procedures they themselves invoked, respondents now attack these procedures as inadequate and say they were deprived of fact-finding which was clearly open to them.

As for respondents' description of the procedural posture of the two parallel actions involved in this case at the time the federal suit was dismissed, it is nothing more or less than misrepresentation. First, the suits did not involve separate issues as respondents now suggest. Not only were the federal issues raised in both the state and federal courts identical, but they were supported by virtually identical legal argument. The Court of Appeals below explicitly recognized that (App. A at 5a n.6). Furthermore, it is clear that respondents did not expose their federal claims to judgment in the state proceeding because they believed *England* v. *Louisiana Bd. of Medical Examiners,* 375 U.S. 411 (1964), required them to do so. In fact, they injected their constitutional issues into the state proceeding, in a brief filed on March 28, 1977, *before* the matter was dismissed by the district court on April 4, 1977. They did so without making a reservation of rights under *England.* Thus, respondents' current claims that they raised their federal claims in the state proceeding because they had no choice is wholly without substance.

Similarly without substance, and especially curious, is respondents' contention that they brought the state action because they feared that the district court would abstain under *Railroad Comm'n* v. *Pullman*, 312 U.S. 496 (1941), and because New Jersey court rules required that they challenge the regulations within 45 days of their promulgation. It is doubtful that they proceeded as they did for those reasons. For *Pullman* abstention has never depended on whether there was a state action in progress. And it is well settled that the 45-day time limit respondents cite has no application where, as here, the constitutionality of regulations is involved. *McKenna* v. *New Jersey Highway Auth.*, 19 N.J. 270, 276, 116 A.2d 29 (1955).

Finally, mention should be made of respondents' assertion, reiterated several times in their brief, that *Younger* has no application here because no state interests were affected by the federal action they instituted. By their argument, they ignore that this case implicated substantial state interests—New Jersey's interest in the qualifications of the teachers who teach in its public schools and the considerable time and energy its courts had invested in the state action—and that there was no interference with state functions simply because the district court refused to intervene and thereby avoided precisely the type of federal-state tension a federal court seeks to avoid when it invokes *Younger*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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